No. 88-1962

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

EAST TEXAS STEEL FACILITIES, INC., PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER EAST TEXAS STEEL FACILITIES, INC.

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I. Respondents Try to Mislead the Court by Quoting Out of Context and Misstating Interior's Contract Obligations: 43 C.F.R. §193.16 Required Both Notice *and* Performance to Exercise the Option; Interior's Failure to Perform Breached the Contracts.

Each of petitioner's five federal coal leases had the same option contract reserving Interior's right to make changes on the 20th anniversary of each lease. Pet. App. 5a, 128a, 137a, 146a, 150a-153a (assignment agreement), 159a. Respondents argue that notice (promise to perform) alone sufficed to exercise the option, and to support that argument quote *only* the notice requirements of the governing regulation, 43 C.F.R. §193.16 (1954). Res. Br. 5. Respondents, however, quote the regulation out of context with the performance requirements conspicuously missing. The regulation reads in whole:

> The terms and conditions of a lease are subject to readjustment at the end of each twenty-year period

> succeeding the date of the lease unless otherwise provided by law at the time of the expiration periods. The lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made. *Unless the lessee files objection to the proposed terms or a relinquishment of the lease within 30 days after the receipt of the notice, he will be deemed to have agreed to such terms.* Notice of the proposed readjustments will be given, whenever feasible, before the expiration of each such twenty-year period. *(emphasis supplied)*

The regulation clearly requires that the notice must state proposed terms (the mode of acceptance is that Interior perform by giving the proposed terms). This is true, as a lessee receiving notice with no terms would have no basis to file an objection. Further the terms must accompany the notice, not be received later, as the lessee has 30 days from receipt to file objection.

Contrary to Respondents' contention, the Tenth Circuit's decision in *FMC Wyoming Corp. v. Hodel*, 816 F. 2d 496 at 500, 500 n.8, Pet. App.174a does not support Respondents' interpretation. *FMC* made **no** analysis and **no** findings concerning the application of 43 C.F.R. §193.16 (1954); it considered only regulations promulgated under the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083.

Highly relevant, however, is the Tenth Circuit's decision in *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 667 (10th Cir. 1982), Pet. App.197a. *Rosebud* held that the leases, MLLA and the pre-FCLAA regulation expressly required performance and that the pre-FCLAA regulation alone added the requirement of notice (promise to perform). Further, the Court agreed with the trial court record: that in applying the pre-FCLAA regulations Interior's "historic practice" (and specifically from 1960 to 1976) was to complete readjustments, send notice and proposed terms, by the 20th anniversary, "or very soon thereafter." *Ibid.* at 952, Pet App. 199a. Thus Respondents' own practice in applying the pre-FCLAA regulations confirms Petitioner's argument that proposed terms had to accompany notice.*

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*Respondents apparently agree that 43 C.F.R. §193.16 [see next page]

II. Respondents Fail to Address the Issue of Whether Congress Intended the Mineral Lands Leasing Act (1920) To Create An Open-Ended Lease With Interior Free to Change Or Cancel All Terms While Unalterably Binding Lessee.

Respondents do not address the questions before this Court. Congress' right to reserve expressly the authority to amend a law is not questioned. The questions presented are (1) whether Congress made such an expressed reservation in the MLLA, and (2) if Congress did make such an expressed reservation, whether MLLA leases are contracts in light of the Tenth Circuit's construction of that reservation as one of "unlimited powers" to change or cancel at will a federal coal lease on its 20th anniversary. More specifically, does the MLLA proviso, "unless otherwise provided by law," make such a reservation, and is the Tenth Circuit's construction of that proviso correct? Since this Court has already found MLLA coal leases are contracts that bind the government; and, further, that unlimited reserved powers (thereby providing an escape clause) destroys a contract, the Tenth Circuit's construction of MLLA coal contracts cannot stand. *Pan American Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927) and *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923).

Finally, contrary to respondents' contention, Congress did not use in the MLLA the important amending language of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986); therefore *Bowen* is not on point. Such explicit amending language should not be read into a surplusage MLLA proviso where no evidence of specific Congressional intent to do so exists. The Tenth Circuit's

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(1954) was the correct regulation to apply, even though Interior actually applied regulations promulgated under FCLAA to petitioner's leases. As lease provisions are binding between 20th anniversary periods (Res. Br. 3, 5), applying the FCLAA regulations to the option contract before the 20th anniversary of the leases was retroactive application of FCLAA to the leases. Respondents apparently see this as technical violation, asserting both regulations required only notice. However, as seen above, the pre-FCLAA regulation required performance; imposing the FCLAA regulation allowing notice (promise to perform) to suffice waived a condition precedent in favor of the lessee and breached the contracts.

construction, however, goes further. It reads such language into the MLLA to allow the application of FCLAA, which also has no evidence of specific Congressional intent that should apply to Petitioner's leases. A construction based on a construction, of court-implied legislative intent in FCLAA founded on surplusage language in MLLA, represents a radical departure from common rules of statutory construction.

CONCLUSION

This Court in 1927 found the purpose of the MLLA was to bind the government to a lease contract, as opposed to complete alienation of the public lands. *Pan American, supra.* The Tenth Circuit's construction of MLLA federal coal leases makes these contracts ephemeral creatures of mere shifting regulatory policy, exempting the government but shackling the lessee to unconscionable terms. Such an interpretation was not Congress' intent in 1920 and clearly put no one on notice of such an intent. Who would contract to develop resources and invest millions where the owner was free to freeze out the developer and impose drastic new terms or even cancel the contract! No common citizen could get away with this; and if the government does, it creates a special commercial law for the government's benefit and makes a mockery of good faith dealing.

This case is a clear vertical conflict; a decision failing to apply and discuss controlling cardinal rules of contract law and Supreme Court precedent. The petition for a writ of certiorari should be granted.

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